U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: SEPT. 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to classify the Beneficiary as an individual of exceptional ability to serve as a Mediterranean and kosher food menu specialist. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not demonstrated that the Beneficiary was an individual of exceptional ability or that the job required an individual with that level of expertise.

The matter is now before us on appeal. In its appeal, the Petitioner resubmits evidence of record and presents case law and a non-precedent decision. It maintains that the Director erred by applying a standard that exceeded the requirements of the classification and not taking into account the unique nature of the position.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A designation that demonstrates the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i).

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that

satisfies at least three of these criteria in order to meet the initial evidence requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality").[1]

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The Petitioner filed the Form I-140, Immigrant Petition for an Alien Worker, identifying the proposed employment as Mediterranean and kosher food specialist. The Petitioner did not list a Standard Occupational Classification (SOC) code, but provided the following nontechnical description of the job: "Evaluate current and introduce new menu, commensurate with halal and kosher food requirements." Accompanying the petition was an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which DOL certified. On this form, the Petitioner also listed the job title as Mediterranean and kosher food menu specialist, but gave an occupation title of dietitians and nutritionists, SOC code 29-1031. It is this occupational title and SOC code that DOL certified, according to its approval letter.

The Director issued several requests for evidence (RFE). In the first one, the Director evaluated the petition as seeking to classify the Beneficiary as an advanced degree professional, which also falls under section 203(b)(2) of the Act. In the second RFE, the Director requested additional evidence relating to the exceptional ability criteria. The third RFE requested another copy of the Petitioner's response to the second RFE, which the Petitioner provided. The fourth RFE inquired into the substantial intrinsic merit of the Beneficiary's occupation, which is an issue for national interest waivers of the labor certification. The fourth and final RFE addressed the Petitioner's ability to pay the proffered wage. The materials in the record relating to exceptional ability consist of the Beneficiary's diploma, experience verification, and reference letters. The items all relate to 1984 through 2003. According to his Form G-325A Biographic Information, which accompanied his Form I-485, Application to Register Permanent Residence and Adjust Status, the Beneficiary has not been employed since 2004.

III. ANALYSIS

The two issues on appeal are whether the Petitioner established that the Beneficiary has exceptional ability and whether it demonstrated that the position requires an individual with that level of expertise. On appeal, the Petitioner maintains that some of the statements in the various RFEs reveal a lack of understanding of the classification's requirements, resulting in prejudicial error. While some of the RFEs did raise subjects that are not material to the benefit requested, the subsequent denial addressed the correct issues. Our analysis, therefore, is whether the Director correctly

[1] *See also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

concluded in that decision that the Beneficiary is not eligible for the classification sought. The Petitioner contends that the Director erred in citing case law for a higher classification, individuals of extraordinary ability under section 203(b)(1)(A) of the Act. Ultimately, the Petitioner contends that the labor certification expressly requires exceptional ability and that the Beneficiary meets at least three criteria in addition to having provided comparable evidence that also demonstrates his exceptional ability. For the reasons discussed below, we find that the record supports the Director's decision.

A. Exceptional Ability

1. Criteria

The Director concluded that the Petitioner did not satisfy at least three of the regulatory criteria. On appeal, the Petitioner maintains that the Beneficiary meets three of those criteria and that the record also contains comparable evidence of his exceptional ability. We find that the Petitioner has not offered documentation that qualifies under at least three criteria or material that is comparable to those standards. While the Petitioner correctly notes on appeal that *Kazarian*, 596 F.3d at 1115, involved a higher classification than the one sought, we cite it not for the standard of eligibility, but for the structure of the analysis. Specifically, it stands for the proposition that we first count the evidence and then evaluate its quality as to whether it is indicative of the statutory standard. Unlike *Kazarian*, where the standard was national or international acclaim, the standard in this case is a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner presented the Beneficiary's diploma from the [redacted] qualifying him as a technologist of public catering. An evaluation in the record equates this degree to an associate's degree in culinary arts technology from a regionally accredited college or university in the United States. This item meets the plain language requirements of this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Director found that the Petitioner meets this criterion. The labor certification indicates that the Petitioner will accept experience in an alternate occupation, kitchen manager. The plain language of the regulation requires experience "in the occupation for which he or she is being sought." The

occupation DOL certified is dietician/nutritionist.[2] While the Petitioner documented that the Beneficiary had 10 years of work experience, it must verify that he has 10 years of experience in the occupation for which he is being sought.

chief executive officer of in Russia, confirms that the Beneficiary began employment in that hotel's restaurant in July 1988 as a head cook/kitchen manager and was promoted to food service supervisor/restaurant manager in 1989, where he stayed through April 1991. The owner of in attests that the Beneficiary served as a culinary chef, nutritionist, and kitchen manager from December 1991 through December 2000. owner and president of in Israel, lists the Beneficiary's position in that restaurant as executive culinary chef, nutritionist, and restaurant manager.

While does not mention any nutritionist duties, the Petitioner documented that the Beneficiary has 10 years of experience in Israel after leaving Both Israeli experience letters use the term "nutritionist" in describing his title. The duties that follow, however, are not entirely consistent with a nutritionist, especially when considered with the reference letters from the same businesses. The experience letters both contain identical language regarding nutrition-related duties, including advising "customers on nutritional contest [*sic*] and value of dishes" and staying "abreast of technologies and trends in the nutritional industry." Other duties include developing creative designs and presentation for dishes, managing the operation of the restaurant, and the selection and purchase of ingredients.

In a follow-up reference letter, affirms that the Beneficiary was "well prepared to handle kitchen management duties" based on his "restaurant training and experience." The letter also praises the Beneficiary's "rare talent in cuisine and dietary requirements for our local population." He concludes that the Beneficiary's contribution to the restaurant was that their dishes "appeared and tasted better." Similarly, of describes the Beneficiary's efforts introducing Eastern European items to the menu of a kosher restaurant.

The Petitioner submitted materials from the O*Net website relating to kitchen managers. According to this information, these managers train workers in food preparation, sanitation, and safety; supervise in the kitchen; control food inventory; and specify food portions and courses. The same website indicates that while dieticians and nutritionists monitor food service operations, they also assess nutritional needs, advise patients, offer counseling services, and consult with physicians and health care personnel with respect to specific patients or clients.[4]

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[2] If the Petitioner contends it is offering the Beneficiary a position as a kitchen manager, a different occupation, it did not obtain the correct certification from DOL.

[3] While the translation of the experience letter lists the first name as the translation of the subsequent letter indicates his first name is

[4] O*NET OnLine Summary Report for 29-1031.00 – Dietitians and Nutritionists, http://www.onetonline.org/link/summary/29-1031.00, accessed September 6, 2016 and incorporated into the record of proceeding.

Considering all of the letters, the record does not demonstrate by a preponderance of the evidence that the Beneficiary has 10 years of experience "in the occupation" DOL certified, dietician/nutritionist. Even if we accepted this experience as similar to the duties the Petitioner actually intends for the Beneficiary, regardless of the occupation DOL certified, for the reasons discussed below, he does not meet a third criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Petitioner has never maintained that the Beneficiary meets this criterion and the record contains no evidence the Beneficiary is licensed.[5]

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Petitioner has emphasized the proffered wage on a copy of the labor certification and the prevailing wage for kitchen managers. This criterion requires that the Beneficiary have already commanded a qualifying salary or remuneration. The record does not contain evidence of his past compensation. Accordingly, the Petitioner has not satisfied this criterion.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner does not contend that the Beneficiary meets this criterion and the record contains no evidence relating to it.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Petitioner relies on two reference letters to meet this criterion. On appeal, the Petitioner maintains that these letters "corroborated the rare abilities and exceptional talents of the [B]eneficiary," and that the letters demonstrate his ability to improve a restaurant's menu. The Petitioner offers case law and a non-precedent decision to support its position that the Director applied the extraordinary ability standard when reviewing the letters. Regardless of the classification, U.S. Citizenship and Immigration Services (USCIS) may evaluate the probative value of submitted letters. For example, merely repeating the language of the statute or regulations does not satisfy a petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942, at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory statements. *1756, Inc. v. The United States Att'y Gen.*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

[5] The State of Florida, where the job is located, requires dieticians and nutritionists to be licensed. *See* Florida Health Licensing and Regulation, http://www.floridahealth.gov/%5C/licensing-and-regulation/index.html.

Both reference letters attest that the Beneficiary contributed to the menus at those restaurants, designing creative dishes that conformed to kosher laws, such as by substituting non-dairy ingredients into beef stroganoff. Neither the Petitioner nor the letters, however, specify how the Beneficiary has been recognized "for achievements and significant contributions to the industry or field," or how improving the menus of two restaurants contributes significantly "to the industry or field." confirms that, after the Beneficiary's changes, "important clients" began using her restaurant for their private affairs. Contributing to the success of a restaurant, however, without evidence that the success started an influential trend, is not a significant contribution to the industry or field, required by the plain language of this criterion. Accordingly, the Petitioner has not satisfied this criterion.

Comparable evidence. 8 C.F.R. § 204.5(k)(3)(iii).

The Petitioner states that the Beneficiary's knowledge of kosher laws should be considered to be comparable evidence of his exceptional ability. The regulation allows for comparable evidence to establish eligibility where the standards at 8 C.F.R. § 204.5(k)(3)(ii) "do not readily apply to the beneficiary's occupation." First, the Petitioner has not shown that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the Beneficiary's occupation, either dietician/nutritionist or kitchen manager. Further, the Petitioner has not explained how knowledge of kosher laws is comparable to those criteria.

Even if we were to consider the Beneficiary's familiarity with those laws, we find the Petitioner has not established that it is indicative of exceptional ability. The Petitioner maintains that a shortage of kitchen managers with a knowledge of kosher laws shows that the Beneficiary has a degree of expertise above the average individual in that occupation. A shortage of workers with the necessary skills for a position is a basis for issuing a labor certification; it is not necessarily evidence of exceptional ability. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The fact that the Beneficiary has an understanding of a specialty form of cooking, kosher-compliant, does not automatically mean that he has a degree of expertise significantly above that ordinarily encountered. Accordingly, the Petitioner has not offered comparable evidence demonstrating the Beneficiary's exceptional ability.

2. Summary

For the reasons discussed above, while the Petitioner is an experienced chef and kitchen manager with knowledge of kosher laws, the record does not demonstrate that he has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

B. The Job Requirements

In addition to showing that the Beneficiary has exceptional ability, the Petitioner must also demonstrate that the job requires an individual with that level of expertise. 8 C.F.R. § 204.5(k)(4)(i).

On appeal, the Petitioner contends that the position "required exceptional ability as compared to similar colleagues in that industry." In section H of the approved labor certification, box 10-B, the Petitioner indicated that, in lieu of experience in the job offered, it would accept 10 years of experience in an alternate occupation, kitchen manager. In box 14, the Petitioner listed the specific skills or other requirements as: "Degree of expertise above that ordinarily encountered, requires senior experience with employer's specialty cuisine and implementation of rare knowledge of kosher/halal dietary standards."

Based on the alternate occupation acceptable as experience, the Petitioner compares the job requirements with those for a kitchen manager, SOC code 35-1012, as listed on the O*Net's website. The occupational title of the position offered, however, is dietician and nutritionist, SOC code 29-1031. DOL certified that occupational title. Accordingly, an examination of whether the job requires expertise beyond what is ordinarily required of kitchen managers is not necessary or relevant to our analysis. Instead, the relevant inquiry is whether the level of expertise is significantly above that ordinarily encountered among those who work in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

The items on the labor certification that relate to the exceptional ability criteria include the education required, the years of experience necessary, the offered wage, and the specific skills or other requirements. Requiring a degree meets one element. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). Another favorable factor is that the Petitioner required 10 years of experience, although it accepted experience in an alternate occupation while the regulation requires that the experience be in the occupation for which the Beneficiary is being sought. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B). While the proffered wage is higher than the average wage for a kitchen manager, the certified position is dietician/nutritionist. According to the labor certification, the proffered wage equals the prevailing wage for that position. Paying the prevailing wage does not demonstrate that the position requires exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D).

Finally, while the Petitioner specified that it required a degree of expertise above that ordinarily encountered, it qualified that expertise as knowledge of kosher laws. As discussed above, the Petitioner has not established that knowledge of one of many different types of specialization in food preparation, any one of which might be "rare," is necessarily indicative of a level of expertise above that ordinarily encountered in the culinary arts. For these reasons, the Petitioner has not established that the job requires exceptional ability as a dietician/nutritionist.[6]

[6] Even if we were to consider that the job "meets" three criteria such that we would then evaluate all of the factors in the aggregate, the O*Net website information for the occupation DOL certified, dietician/nutritionist, reveals that the Petitioner's job requirements are actually significantly lower than normal for the occupation. For example, most dieticians or nutritionists require a graduate degree, whereas the Petitioner only requires an associate degree. In addition, the State of Florida requires that those working in this occupation be licensed. *See* Florida Health Licensing and Regulation, *supra*. The Petitioner did not expressly require a license or document that the Beneficiary has one such that we might conclude the need for a license is implied by the state requirement.

IV. CONCLUSION

The Petitioner has not demonstrated that the job requires an individual of exceptional ability or that the Beneficiary has such expertise. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A- Corp.*, ID# 17897 (AAO Sept. 13, 2016)